IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

Arbitration Petition No.15 of 2007

Adinath Sahakari Sakhar Karkhana
a coroporate society duly registered
under the Maharashtra Coo Societies
Act 1960 having its office at Shelgaon
Bhalvani, Adinath Nagar
Post Jeur, Tal Karmala, Solapur
through its Managing Director ... Petitioner

vs

The Triveni Engineering and
Industries Ltd., formerly known
as Triveni Engg Works Ltd
a company registered under the
Indian Companies Act, 1956
having its registered office at
Deoband Dist Saharanpur
Uttar Pradesh 247554 and
Corporate office at 8th floor
Express Trade Towers, 15-16
Sector 16A Noida 201301 UP . Respondents

Mr.G.S. Godbole for petitioner.

Mr Sagar Anand i/b Thakore Jariwala Associates for respondents

CORAM: SWATANTER KUMAR,C.J.

Judgment reserved on 21.9.2007.
Judgment pronounced on 11.10.2007

JUDGMENT:-

The simple question that arises for consideration of the court in the present case is whether the petitioner can claim

relief in terms of section 11 of the Arbitration and Conciliation Act,1996 (hereinafter referred to the Act), even after years of cause of action having arisen in favour of the petitioner. The relief claimed by the petitioner under section 11 of the Act is opposed by the respondents primarily on the ground that the petition as well as the claim raised for arbitration are barred by time and as such petitioner is not entitled to any relief. The necessary facts are that the parties entered into an agreement dated 18th March 1990 for design, manufacture, procurement and supply of machinery and equipment of the sugar plant of the petitioner. The agreement was executed at Pune. Clause 19 of the said agreement contains an arbitration clause, which reads as under:

> "If at any time there should be any question, dispute or difference between the parties in respect of any matter arising out of or in relation to this agreement, either party may give to the other party notice in writing of the existence of such question, dispute or difference and the same shall be referred to the arbitration of a single Arbitrator when the parties may agree upon, otherwise to two arbitrators one to be nominated by each party. The arbitrations shall before proceeding with the reference, nominate an umpire to act in case of disagreement., The award of the Arbitrators shall be final and binding on the parties and be accepted by them. This reference to the arbitrators shall be deemed to be a reference, under the provisions of the Indian Arbitration Act, 1940 and the rules made thereunder and any statutory modifications or re-enactments thereof that may be made from time to time and actually in force at the time of the reference. The cost of arbitration

shall be borne by the parties as may be decided upon by Arbitrators or the umpire as the case may be".

2. Disputes had arisen between the parties and the petitioner filed a suit being Civil Suit No. 666 of 1997 before the Court of Civil Judge, Senior Division, Pune for recovery of Rs.4,33,98,558.76. In that suit the other party filed an application under section 8 of the Act which was contested by the petitioner. Vide Order dated 30th December 2002 the learned Judge dealing with the suit allowed the application holding that there were disputes between the parties which were liable to be referred to arbitration in accordance with clause 19 of the agreement. A copy of the said order is annexed at Exh C to the petition. One Shri V.P.Rane, at the behest of the petitioner or otherwise, agreed to act as the arbitrator. On 15th May 2006 said Shri Rane claimed to have entered upon the reference and fixed hearing on 22nd July 2006. The respondents vide their letter dated 1st August 2006 replied through their counsel to the notice of the arbitrator stating therein that they had never agreed for appointment of Shri Rane as the sole arbitrator and they were not willing to continue the arbitration proceedings before the said arbitrator, terming it as a unilateral reference. It was further stated that

Shri Rane had no authority to proceed with the proceedings. In fact the respondents again through their counsel on 21st August 2006 objected to the very jurisdiction of the said arbitrator and questioned him to clarify as to how he was acting as an arbitrator. The opposition to the jurisdiction as well as requiring the said arbitrator to disclose source of his appointment as the sole arbitrator was reiterated by the respondents vide their letter dated 30th August 2006. During this period the arbitrator had also informed the respondents that he was appointed as the arbitrator through order of the court. In the letter dated 15th May 2005 the arbitrator had stated as under:

> "In the Special Civil Suit No.666 of 1997 between the parties mentioned above, the undersigned has been appointed as an arbitrator.
>
> The arbitrator wishes to commence the arbitrator the arbitration proceedings in the matter.
>
> The parties are hereby directed to forward to the Arbitrator their terms of reference not later than 30th of June 2006.
>
> The arbitrator has fixed the meeting to consider the terms of reference as also other related issues on 22nd July 2006 at the following address at 2.00 p.m.
>
> Shri V.P.Rane
> 1076/24,Giriraj Housing Society
> Opp Dhahanukar Bungalow
> Old Chaturshringi Road,Gokhale Road

Pune 411016

Tel no. 020 25656421, Mobile No. 9822979874
Receipt of this letter be acknowledged immediately

sd/- V.P.Rane
Arbitrator.

ORDER

Inform this to legal adviser accordingly."

Even in his letter dated 14th August 2006 this concept was further clarified by the arbitrator. This according to the respondents is not factually correct.

3. No order of the Court has been placed on record by either party by which V.P. Rane was appointed as the sole arbitrator. On the contrary, the respondents have raised a specific dispute in that regard. Vide letter dated 14th August, 2006, the Arbitrator has reiterated his stand that he was appointed by the Court vide order dated 1st August, 2006, passed in Special Civil Suit No. 666 of 1997. Even according to this letter, the following directions were issued by the Court.

> " 1. Application is allowed so far as it relates to referring the matter to the Arbitrator.
>
> 2. Parties are directed to refer their dispute to the Arbitrator and comply with clause 19, contained in the agreement dt. 8-3-90.
>
> 3. Part of the application regarding dismissal of the suit on the ground that suit is filed against non-existing company is dismissed."

A bare reading of the above order clearly shows that Mr. Rane was never appointed as a sole arbitrator by consent of the parties or by an order of the Court. The Court was only concerned with the petition under Section 9 of the Arbitration Act wherein it found, as a matter of fact, that there was an arbitration agreement existing between the parties and the disputes were liable to be referred to arbitration. The parties are ad idem that no other order was passed by the Court in that Suit and it was only in furtherance to the findings recorded in the order dated 30th December, 2002, that the matter be referred for being resolved by arbitration in terms of clause 19 of the agreement dated 8th March, 1990. Even, according to the case of the petitioner in the present petition, V.P. Rane was never appointed as an Arbitrator by mutual consent of the parties or by any appropriate order passed by the Court of competent jurisdiction. On the other hand, it is stated that Advocate for the petitioner had requested Mr. Rane to act as an Arbitrator. This certainly puts the matter clearly beyond doubt that V.P. Rane was never appointed as an Arbitrator nor was he competent to enter upon the reference and conduct arbitration proceedings. In fact, Mr. Rane is liable to explain his conduct as to on what basis has he claimed to be appointed

as an Arbitrator by an order of the Court particularly when according to the parties no such order had ever been passed by a Court of competent jurisdiction. Referring back to the main issue in the present case, it is clear that the cause of action in favour of the parties had arisen, if at all, prior to the year 1997 as the suit for recovery of money was filed in March, 1997 in which an application under Section 8 of the Act was filed by the respondent herein stating that there was an arbitration agreement between the parties and the suit itself was not maintainable. This application was allowed by the order of the Court dated 30th December, 2002, stating that the disputes exist between the parties and they were liable to be referred to arbitration in accordance with clause 19 of the Agreement dated 8th March, 1990. For reasons best known to the present petitioner, this petition under Section 11 of the Act was instituted in this Court in the year 2007 under Stamp No. 9816 of 2007 on 25th April, 2007. The petition thus has been filed after a lapse of more than ten years i.e. from 1997 to 2007 and, in any case, much beyond three years from the date of the order of the Court dated 22nd December, 2003 when a specific finding was recorded that the disputes between the parties were liable to be referred to arbitration. This order admittedly has attained finality between the parties and was never

questioned. The claims raised in the petition itself have also become barred by time as the said claims were available to the claimants prior to 1997 and, in any case, even if some leverage is given to the petitioner till 30th December, 2002, and if the limitation is computed from that date, still the claim would be barred by time. In this regard, reference can be made to a judgment of the Delhi High Court in the case of *M/s. Nijholt Communications* vs. *Union of India,* decided on September 1, 2005 where the court in such circumstances held as under:

> "5. .... The present petition could be filed by the petitioner within three years when the cause of action first arose in favour of the petitioner i.e. in1998 but in any case not later than September, 2001. While the present petition under Section 11 (6) of the Act has been filed on 6.2.2004 which is patently barred by time. Reference in this regard can be made to Article 137 of the Limitation Act under which any application including an application for arbitration for invoking an arbitration agreement has to be filed within three years from the date of accrual of the cause of action. There is no application for condonation of delay and in any case the conduct of the petitioner hardly would even justify grant of such reliefs. In the case of *The Kerala State Electricity Board, Trivandrum, vs. T.P. Kunhaliumma,* AIR 1977 SC 282, the Supreme Court has clearly held that the provisions of the Limitation Act are applicable to any petition or application including that of the Telegraph Act and application could be filed within three years from the date the cause of action accrued in favour of the petitioner. Their Lordships of the Supreme Court held as under:
>
> > "22. The conclusion we reach is that Article 137 of the 1963 Limitation Act will

> apply to any petition or application filed under any Act to a civil Court. With respect we differ from the view taken by the two Judge Bench of this Court in Athani Municipal Council Case (AIR 1969 SC 1335) (supra) and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure. The petition in the present case was to the District Judge as a Court. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act."
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> 6. The learned counsel appearing for the respondent rightly relied upon the judgment of this Court in the case of *Sunil Kumar vs. M/s. Aakar and another,* 2002 V AD (DELHI) 816 and other judgments of this Court in the cases of *Union of India and another vs. Pawan Aggarwal*, 2003 IV AD (DELHI) 131 and *Pandit Munshi Ram & Associates (P) Ltd.* vs. *Delhi Development Authority and another,* 2001 (1) Arb. LR 113 (Delhi) where in all these cases the court held that an application under the Arbitration Act would be controlled by the provisions of the Limitation Act and a petition filed beyond the prescribed period of limitation of three years would be barred. In the case of *Pandit Munshi Ram & Associates (P) Ltd. (supra),* the Court even held that commencement of period of limitation would be from the date when right to apply accrues."

4. Besides the above judgment, the Supreme Court in the case of *Asia Resorts Ltd.* vs. *Usha Breco Ltd.*, AIR 2002 SC 55, has held that where notice was served on 17th April, 1990

stating that the party would like to take legal action for recovery of its dues, the cause of action would be deemed to have arisen on that date. Reply to the notice was sent on 6th April, 1993. This did not amount to effective mutual consultation between the parties or acknowledgment. The claim petition under Section 20 of the old Act filed on 30th November, 1993 was held to be barred by time. There is no application filed in the present case on the strength of Article 137 of the Limitation Act which would apply to such petitions. The same could be filed within three years from the date of cause of action. There is no explanation on record before us as to why the petition has not been filed within the prescribed period of limitation. The Court had specifically passed an order on 30th December, 2002, putting the entire controversy that there was an existing and binding agreement between the parties and the disputes /claims were referable to arbitration in contemplation of clause 19 of the Agreement. This order, as already noticed, was never challenged by any of the parties to the lis and there could be no justification whatsoever for the petitioner to file the present petition beyond the period of three years, even if computed from that date. This would clearly show that the petition is barred by time and suffers from inordinate delay and laches on the part of the petitioner. The

claims stated in the petition have also become barred by time as they have sought to be referred to arbitration after the lapse of more than 10 years.

5. In accordance with the provisions of Section 43 of the Act, the provisions of Limitation Act, 1963, are applicable to arbitration petitions to be filed in Court. Even if the applicant could take any advantage of the provisions of Section 5 of the Act, then such a request would have to be rejected firstly for the reason that there is no application filed under Section 5 of the Limitation Act and, in any case, there is no sufficient cause or explanation rendered in the petition to condone such inordinate delay in filing the present petition.

6. In these circumstances, I find no merit in this petition. The same is dismissed as being barred by time.

CHIEF JUSTICE